Docket for 04-1724

(29)

No. 04-1724
Vide 04-1407, 04-1704
Title: William W. Wilkins, Tax Commissioner for the State of Ohio, et al., Petitioners
v.
Charlotte Cuno, et al.
Docketed: June 22, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-3960)
Decision Date: October 19, 2004
Rehearing Denied: January 18, 2005
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 17 2005	Petition for a writ of certiorari filed. (Response due July 22, 2005)
Jul 20 2005	Brief amici curiae of Louisville Area Chamber of Commerce, Inc., et al. filed. VIDED.
Jul 20 2005	Brief amici curiae of Council on State Taxation, et al. filed. VIDED.
Jul 20 2005	Brief amicus curiae of Michigan Economic Development Corporation filed. VIDED.
Jul 21 2005	Order extending time to file response to petition to and including August 17, 2005.
Jul 22 2005	Brief amicus curiae of National Governors Association filed.
Jul 22 2005	Brief amici curiae of National League of Cities, et al. filed.
Aug 17 2005	Brief of respondents Charlotte Cuno, et al. in opposition filed. VIDED.
Aug 17 2005	Brief amici curiae of Florida, et al. filed.
Aug 29 2005	Reply of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed.
Aug 31 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Petition GRANTED The petition for a writ of certiorari in No. 04-1704 is granted. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. Sec. 5733.33. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Oct 24 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners Wilkins, et al. VIDED.
Oct 26 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 5, 2005. VIDED.
Nov 14 2005	Brief amicus curiae of Tax Foundation filed. VIDED.
Nov 30 2005	SET FOR ARGUMENT on Wednesday, March 1, 2006.
Nov 30 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED.
Dec 2 2005	Brief amici curiae of Ford Motor Company and General Motors Corporation filed. VIDED.
Dec 5 2005	Brief amicus curiae of Ashbrook Center for Public Affairs filed. VIDED.
Dec 5 2005	Brief amici curiae of Directv, Inc., et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of Council on State Taxation, et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of AlphaGenics, Inc., et al. filed. VIDED.

Dec 5 2005	Brief amici curiae of City of Elyria, Ohio, et al. filed. VIDED.
Dec 5 2005	Brief amicus curiae of Nissan North America, Inc. filed. VIDED.
Dec 5 2005	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of Florida, et al. filed.
Dec 5 2005	Brief of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed.
Dec 5 2005	Joint appendix filed. VIDED.
Dec 5 2005	Brief amici curiae of National Governors Association, et al. filed.
Dec 5 2005	Brief amicus curiae of Wayne County, Michigan filed. VIDED.
Dec 5 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation. VIDED.
Dec 9 2005	CIRCULATED.
Jan 9 2006	Extension of time within which to file respondents' brief on the merits to and including January 23, 2006. VIDED.
Jan 11 2006	Record received from U.S.C.A. 6th Circuit. (1 binder)
Jan 23 2006	Brief of respondents Charlotte Cuno, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amici curiae of Economics and Public Policy Professors Randy Albelda, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amici curiae of Fiscal Policy Institute, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amicus curiae of North Carolina Institute for Constitutional Law filed. (Distributed)
Jan 25 2006	Motion for divided argument filed by petitioner DaimlerChrysler Corp.
Feb 7 2006	Letter from counsel for the respondents received. VIDED.Distributed.
Feb 10 2006	Record received from U.S.D.C. - Northern District of Ohio. (4 volumes) All other pleadings are electronically filed.
Feb 17 2006	Motion for divided argument filed by petitioner GRANTED.
Feb 22 2006	Motion DISTRIBUTED for Conference of March 17, 2006.
Feb 22 2006	Reply of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed. (Distributed)
Mar 1 2006	Argued. For petitioners in No. 04-1704: Theodore B. Olson, Washington, D.C. For petitioners in No. 04-1724: Douglas R. Cole, State Solicitor, Columbus, Ohio. For respondents: Peter Enrich, Boston, Mass.

Supreme Court, U.S.
FILED
041724 JUN 17 2005
OFFICE OF THE CLERK

No. ____

In The Supreme Court Of The United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
STEPHEN P. CARNEY
Senior Deputy Solicitor
ROBERT C. MAIER
Assistant Solicitor
SHARON A. JENNINGS
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for State Petitioners

QUESTION PRESENTED

Does the dormant Commerce Clause allow a State to attempt to attract new business investment in the State by offering credits against the State's general corporate franchise or income tax, where the amount of the credit is based on the amount of a business's new investment in the State?

LIST OF PARTIES

The Petitioners are two Ohio state officials—William W. Wilkins, Tax Commissioner, and Bruce Johnson, Director of the Ohio Department of Development—the City of Toledo, its Mayor, and two local Toledo school districts—Washington Local Schools and Toledo Public Schools. The Petitioners are referred to collectively as "State of Ohio" or "Ohio."

The Respondents are the named plaintiffs as follows:

Charlotte I. Cuno, Branwen M. Lowe, Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Hutton Pharmacy, Inc., Duane M. Arquette, Kim's Auto and Truck Service, Inc., Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek, Kathleen Hawkins, Carrie Hawkins, Jane Slaughter and Rick Van Landingham.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. The plaintiffs below challenged two tax incentives that Ohio uses to attract business investment. 5

B. The tax incentive at issue here is a credit that Ohio offers against its corporate franchise tax for new in-state business investment. 7

C. The district court determined that the ITC was not discriminatory and did not violate the dormant Commerce Clause. 10

Page

D. The Sixth Circuit concluded that although the ITC is equally available to in-state and out-of-state business, the ITC nonetheless discriminates on its face against interstate commerce. 12

REASONS FOR GRANTING REVIEW 14

A. The decision below creates confusion regarding the interaction between the dormant Commerce Clause and state tax credits. 14

1. The dormant Commerce Clause view articulated below conflicts with the Michigan Supreme Court's decision in *Caterpillar*. 14

2. In striking Ohio's ITC, the Sixth Circuit rejected the principles underlying the Court's dormant Commerce Clause jurisprudence. 16

B. Failure to provide immediate review will cause irreparable harm to Ohio and other States..... 21

1. The lack of a uniform national rule uniquely disadvantages Ohio (and the other Sixth Circuit States) in the competition for business capital. 22

2. Uncertainty regarding the constitutionality of locational tax incentives harms States across the country..... 23

Page

C. Tax and economic development policies lie at the core of State sovereignty, and the decision below improperly interferes with that sovereign power. 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Cases **Page**

Arkansas v. Farm Credit Servs.,
520 U.S. 821 (1997) 26

Bacchus Imports, Ltd. v. Dais,
486 U.S. 263 (1984) 20

Boston Stock Exch. v. State Tax Comm'n,
429 U.S. 318 (1977) 5, 11, 16, 20

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 17

Caterpillar, Inc. v. Mich. Dep't of Treasury,
488 N.W.2d 182 (Mich. 1992) 14, 15, 19

Container Corp. of Am. v. Franchise Tax Bd.,
463 U.S. 159 (1983) 8

Cuno v. DaimlerChrysler, Inc.,
386 F.3d 738 (6th Cir. 2004) 1

Cuno v. DaimlerChrysler, Inc.,
154 F. Supp. 2d 1196 (N.D. Ohio 2001) 1

Dep't of Revenue v. ACF Indus.,
510 U.S. 332 (1994) 5, 26

Fulton Corp. v. Faulkner,
516 U.S. 325 (1996) 12, 19

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988) 19, 20

Page

Rio Indal, Inc. v. Lindley,
405 N.E.2d 291 (Ohio 1980) 7

Trinova Corp. v. Mich. Dep't of Treasury,
498 U.S. 358 (1991) 11, 15

United States v. Munsingwear, Inc.,
240 U.S. 36, 39 (1950) 14

Wesnovtek Corp. v. Wilkins,
825 N.E.2d 1099 (Ohio 2005) 7, 8

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 11, 17, 20

Westinghouse Elec. Co. v. Tully,
466 U.S. 388 (1984) ..... *passim*

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1441 6
Ohio Rev. Code § 5733.01 7
Ohio Rev. Code § 5733.05 8
Ohio Rev. Code § 5733.33 ..... *passim*
Ala. Code § 41-23-24 22
Ark. Code Ann. § 15-4-2706 22
Ark. Code Ann. § 15-4-1904 22
Cal. Rev. & Tax. Code § 23649 22
Fla. Stat. Ann. § 220.191 22
Ga. Code Ann. § 48-7-40.21 22
Haw. Rev. Stat. § 209E-9 22
35 Ill.Comp. Stat. 5/201(f) 22
Ind. Code § 6-3.1-11-16 22

Page

Iowa Code § 15.333 22
Kan. Stat. Ann § 79-32, 160a 22
Me. Rev. Stat. Ann. tit. 36, § 5219-E 22
Md. Ann. Code art. 83a, § 5-1501 22
Mass. Gen. Laws ch. 63, § 38N 22
Minn. Stat. § 469.171, subdiv. 1(2) 22
Miss. Code Ann. § 57-73-21 22
Mont. Code. Ann. § 15-31-134 22
N.Y. Tax Law § 210(12)(a) 22
N.C. Gen. State. § 105-129.9 22
Okl. Stat. tit. 68 § 2357.4 22
Or. Rev. Stat. § 317.124 22
S.C. Code Ann. § 12-14-60 22
Va. Code Ann. § 59.1-280.1 22

Other Authorities

G. Gambale, *19th Annual Corporate Survey*, Area Development Magazine (2004), available at http://www.area-development.com/FrameCorpSurvey4.html (last visited June 16, 2005) 22

P. Enrich, *Saving the State from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996) 24

P. Tatarowicz & R. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879 (1986) 15, 24

W. Hellerstein & D. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789 (1996) 4, 24

PETITION

Two Ohio state officials—William W. Wilkins, Tax Commissioner, and Bruce Johnson, Director of the Ohio Department of Development, along with the City of Toledo, its Mayor, and two local Toledo school districts—Washington Local Schools and Toledo Public Schools (all of these persons and entities are referred to collectively as "State of Ohio" or "Ohio") respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case. This Petition seeks review of the same judgment challenged (on different grounds) by the petition in Supreme Court Case No. 04-1407. This Petition, however, is independent of that one, and Ohio asks the Court to consider this Petition regardless of whether it grants the petition in No. 04-1407.

OPINIONS BELOW

This case involves three relevant opinions: the Sixth Circuit's Order Denying Rehearing and Rehearing En Banc of January 18, 2005, reproduced at Cuno Cert. App. 36; *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004) (amended opinion), reproduced at Cuno Cert. App. 1–20; and *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196 (N.D. Ohio 2001), reproduced at Cuno Cert. App. 21–34. ("Cuno Cert. App." refers to the appendix of the opening petition for certiorari, Supreme Court Case No. 04-1407. In accord with Supreme Court Rule 12.5, the material in the opening petition's appendix is not reproduced in this cross-petition's appendix.)

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its original judgment and opinion on September 2, 2004. Ohio and other parties timely filed a petition for rehearing with a suggestion for rehearing en banc on September 16, 2004. On October 19, 2004, the Sixth Circuit entered an amended opinion and judgment. The

parties timely renewed their request for rehearing en banc on October 29, 2004. On January 18, 2005, the Sixth Circuit denied the petitions. On April 7, 2005, Justice Stevens signed an order extending the time for filing this petition to and including June 17, 2005. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the application of the dormant Commerce Clause doctrine to a credit under Ohio's corporate franchise tax, Ohio Revised Code § 5733.33 (Ohio Cert. App. 1a–9a). (All of the citations to Ohio statutes refer to the versions in effect on November 12, 1998 when DaimlerChrysler entered into its tax agreements.) Basically, the tax credit allows corporate taxpayers to claim a percentage of any new business investment they make in Ohio as a credit against their Ohio corporate franchise tax. The statute is set forth in full in the appendix included with this petition.

Article I, sec. 8, cl. 3 of the United States Constitution states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

INTRODUCTION

This case presents the vitally important question of whether, and to what extent, the dormant Commerce Clause doctrine prevents States from using investment tax credits to compete for new business investment. The court below, in a dramatic and unwarranted extension of dormant Commerce Clause principles, declared Ohio's Investment Tax Credit ("ITC") unconstitutional. Remarkably, the sole basis for the decision was a theory that the plaintiffs themselves candidly describe as "novel." Appellant Br. at viii (6th Cir Case No. 01-3960). And novel it is, for no other federal court has ever

held, or even suggested, that an ITC like Ohio's (or any other ITC for that matter) is unconstitutional. In fact, such credits have previously been understood as not only acceptable, but as a critical component of the competition among the States for business development.

The Sixth Circuit's reliance on the plaintiffs' "novel" theory to strike Ohio's ITC warrants immediate review for three reasons. First, the decision below sows the seeds of conflict and confusion on the interaction between the dormant Commerce Clause and state tax credits, an area that is already murky at best. As the court below noted, "[t]he United State Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," Cuno Cert. App. 6, and from this void competing views have emerged. For example, the dormant Commerce Clause theory the court below relied on to strike Ohio's ITC conflicts with the theory the Michigan Supreme Court relied on in upholding a similar Michigan tax scheme. Moreover, the lower court's opinion here goes well beyond any reasonable interpretation of this Court's Commerce Clause jurisprudence. Further confusing the matter, while the court below struck Ohio's ITC on the grounds that the ITC improperly discriminates against out-of-state investment, the panel at the same time *upheld* a property tax exemption that similarly favored investments in Ohio, and it did so without clearly articulating why one locational incentive was impermissible, while the other passed constitutional muster.[1] Nor did the opinion clearly establish what particular aspect of the ITC it found unconstitutional, thus depriving Ohio (and the other States in the Sixth Circuit) of any guidance on how,

---

[1] Respondents here filed their own petition seeking review of the property tax ruling. See Supreme Court Case No. 04-1407. Ohio agrees that, if the Court grants review of this petition, review of that petition may be warranted as well. See Ohio's Brief in Response to Petition For A Writ of Certiorari (Supreme Court Case No. 04-1407) at 2.